No. 76-855

FILED
MAR 9 1977
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1977

LEGGETT & PLATT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

DANIEL M. FRIEDMAN,
Acting Solicitor General,

DONALD I. BAKER,
Assistant Attorney General,
BARRY GROSSMAN,
ROBERT J. WIGGERS,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-855

LEGGETT & PLATT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

---

1. Petitioner manufactures metal bed springs and innersprings (J.A. 8a, 18a).[1] This suit was filed by the United States in May 1971, alleging that petitioner's acquisition of two other manufacturers of metal bed springs and innersprings violated Section 7 of the Clayton Act, 38 Stat. 731, as amended, 15 U.S.C. 18 (Pet. App. A 1a). During discovery, petitioner requested the government to produce numerous documents relating to other Section 7 investigations it had conducted in the same industry (Pet. App. A 1a, 2a). The government objected initially on the grounds that such documents were variously irrelevant, exempt as attorney work product, or contained confidential business information. The district court overruled these objections (J.A. 228a-229a).

---

[1] "J.A." refers to the Joint Appendix in the court of appeals.

The government then moved for reconsideration, asserting as to certain documents an intra-governmental communications privilege for internal memoranda, and reiterating its relevancy and work product, but not the confidential business information claims (J.A. 230a -231a). The district court also overruled this motion, and ordered production (Pet. App. B). It held that the work product exemption "terminates" "[w]hen a case has ended or when an investigation is closed" (Pet. App. B 12a).

With respect to the claim of privilege for intra-governmental communications, it applied a "weighing and balancing of interests" test (Pet. App. B 17a), and held that "none of the accepted privileges are applicable here" because "to deprive a litigant of information that he deems essential to his cause, when such information is in the possession of the adverse litigant, is to in effect deprive him of his day in court" (Pet. App. B 18a). The court made no other reference to the petitioner's need for the documents or their relevance.

In order to protect its rights and to secure an appealable final order, the government declined to comply with the production order (Pet. App. A 2a). The court then dismissed the suit, but without prejudice (Pet. App. C 20a).

The court of appeals reversed, holding that the district court had erred as a matter of law (Pet. App. A).[2] Although petitioner had asserted that the documents were relevant to its attempt to prove alleged discriminatory enforcement of Section 7 against it, petitioner had not alleged that the goverment had any animus against it or intended to deprive it of its constitutional rights. The court of appeals ruled that petitioner was merely challenging the government's exercise

---

[2]The court of appeals decision is reported at 542 F. 2d 655.

of its prosecutorial discretion, that under these circumstances the alleged discriminatory enforcement would not have been a defense, and that documents whose only claimed relevance related to that allegation need not be produced (Pet. App. A 3a-4a).

With respect to intra-governmental communication, the court agreed with the district court's balancing approach but ruled that the government's interest in preserving the confidentiality of intra-governmental memoranda could be overcome only if the court found that petitioner had an objective need for the documents. The fact that petitioner "deems" the documents "essential," the court held, was not itself sufficient as a matter of law to outweigh the government's interest (Pet. App. A 4a-5a). Finally, the court ruled that the district court had erred as a matter of law in failing to apply the work product doctrine to closed investigations (Pet. App. A 6a-8a).

The court remanded the case to the district court to determine under the standards it had outlined the factual basis for the claims of irrelevancy, work product, and governmental privilege (Pet. App. A 9a).

2. The court of appeals decision is essentially interlocutory. It does not finally determine whether petitioner can obtain the documents it seeks. On remand, the district court will redetermine what must be produced under the court of appeals' standards of relevance, governmental privilege and work product (Pet. App. A 9a). There is no reason for the Court to consider these questions at this stage of the litigation. In any event, they were correctly decided.

a. Petitioner's contention that the court of appeals' decision conflicts with *National Hockey League* v. *Metropolitan Hockey Club, Inc.*, No. 75-1588 (June 30, 1976) (Pet. 12-13) is unsound. In that case, the district court

dismissed a suit with prejudice after the plaintiffs had unjustifiably procrastinated for seventeen months in answering interrogatories they had been ordered to answer, then filed "grossly inadequate" answers. Slip op. 4. The court stated: "the conduct of the plaintiffs demonstrates the callous disregard of responsibilities counsel owe to the Court and to their opponents." Slip op. 2. Despite these findings, the court of appeals reversed and reinstated the case. This Court summarily reversed, on the ground that the record showed a willful, bad faith refusal to comply with discovery orders, and that in such circumstances, the district court had not abused its discretion in dismissing the suit.

Here, in contrast, neither the district court nor the court of appeals found that the government had acted in bad faith. Indeed, the district court rejected petitioner's request (J.A. 300a) for dismissal with prejudice (Pet. App. C); thus the case could have been reinstituted even if the government had lost its appeal. The purpose of the dismissal was not, as in *National Hockey League*, to punish the plaintiff's disobedience, but to enable the government to present its contentions to the court of appeals in the manner approved in *United States* v. *Procter and Gamble Co.*, 356 U.S. 677, 680-681.[3]

---

[3]Petitioner charges bad faith because the government did not appeal with respect to all of the documents it withheld (Pet. 11-12). Far from showing bad faith, the government narrowed the scope of its differences with petitioners.

Petitioner's computation of the number of pages of documents withheld after the district court's original order of discovery and before appeal is based on an offhand estimate by a government attorney (Pet. App. E 24a-25a), and the computation of the number of pages on which the government continued its claim of privilege on appeal is based solely on the index of documents submitted to the court of appeals (Gov't Br., Addendum D). For purposes of simplification, the government did not enumerate the numerous duplicates of documents in the index, but they are contained among the documents lodged under seal in the court of appeals, and identified in the sealed list of documents transmitted to the court of appeals. See J.A. 356a.

b. Petitioner contends that the court of appeals improperly impinged upon the trial court's discretion because that court had examined the individual documents and ruled that the government must produce them (Pet. 7-9, 12-15). Judicial discretion, however, is governed by "fixed rules of law" (*Barry* v. *Edmunds*, 116 U.S. 550, 559; *Merola* v. *Atlantic Richfield Co.*, 493 F. 2d 292, 295 (C.A. 3)), and the court of appeals reversed because it concluded that the district court had applied erroneous legal standards. The court of appeals correctly ruled that a showing of objective need, as distinguished from petitioner's mere wish to examine the documents, is necessary to override the government's privilege for internal memoranda.[4] That objective need is measured, as the court of appeals held (Pet. App. A 5a-6a), by, "*inter alia*, the importance of the documents to [Leggett & Platt's] defense, * * * and the availability elsewhere of the information contained in the documents." The petition does not challenge this standard.[5]

The court of appeals also correctly held that documents prepared in anticipation of litigation are not excluded from the work product exemption solely because they relate to closed investigations. Its ruling accords with other appellate decisions on the issue. *Duplan Corp.* v. *Moulinage et Retorderie de Chavanoz*, 487 F. 2d 480 (C.A. 4).[6] Cf. *Republic Gear Co.* v. *Borg-Warner Corp.*, 381 F. 2d 551, 557 (C.A. 2). Protecting the confidentiality of materials

---

[4]See, *e.g.*, *Sun Oil Co.* v. *United States*, 514 F. 2d 1020, 1024 (Ct. Cl.); *Kaiser Aluminum & Chemical Corp.* v. *United States*, 157 F. Supp. 939, 946-947 (Ct. Cl.); Cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 86-89.

[5]Petitioner's suggestion that the district court in fact determined that petitioner had an objective need for the documents (Pet. 7-9, 13) is without basis; under the district court's legal theories, such a finding would have been superfluous.

[6]District courts, prior to the *Duplan* case, were divided on the applicability of the work product doctrine to materials prepared for

prepared for prior litigation accords with the policy of F.R. Civ. P. 26(b)(3) and *Hickman* v. *Taylor*, 329 U.S. 495, to preserve the privacy of an attorney in preparing litigation, except where such materials must be produced to avoid injustice. *Id.* at 509-511.[7]

---

prior litigation, as the court of appeals indicated (Pet. App. A 6a-7a). Reported decisions since *Duplan* have generally followed that case. *United States* v. *O.K. Tire & Rubber Co.*, 71 F.R.D. 465, 468, n. 7 (D. Idaho); *SCM Corp.* v. *Xerox Corp.*, 70 F.R.D. 508, 516 (D. Conn.); *Burlington Industries* v. *Exxon Corp.*, 65 F.R.D. 26, 43 (D. Md.); *Commonwealth of Puerto Rico* v. *SS Zoe Colocotroni*, 61 F.R.D. 653, 658 (D. P.R.).

In *United States* v. *International Business Machines Corp.*, 71 F.R.D. 376, 378 (S.D.N.Y.), petition for mandamus denied, 539 F. 2d 703 (C.A. 2), and *United States* v. *Pfizer, et al.*, D. Minn., Nos. 4-71 Civ. 435 and 4-71 Civ. 403, appeal pending *sub nom. In re Murphy et al.*, C.A. 8, Nos. 76-1916 and 76-1931, the United States successfully argued in the district courts that the work product exemption terminates with the litigation for which documents are prepared. That position was initially adopted by the government in those cases prior to the *Duplan* decision and the relevant discovery proceedings in this case. In both cases, the government informed the appellate courts that it has receded from that view and has adopted a contrary position in this case. See Pet. App. F 27a and n. 20; Brief for the United States 25-26, *In re Murphy*, *supra*. The *IBM* case is discussed further, *infra*, footnote 8. *In re Murphy* is awaiting argument.

[7] *National Labor Relations Board* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 154, did not hold that work product materials in closed cases are outside the work product doctrine exemption. On the contrary, this Court held that intra-agency memoranda exempt from discovery in litigation under the work product doctrine were also exempt from compulsory disclosure under the Freedom of Information Act, 5 U.S.C. 552(b)(5). The materials sought were memoranda from the General Counsel of the National Labor Relations Board determining whether unfair labor practice complaints should be filed on charges referred to his office by regional directors. All memoranda directing cases to be closed were ordered released, *id.* at 155-159, primarily because they constituted final agency dispositions of the charges, and thus had to be disclosed under 5 U.S.C. 552(a)(2)(A). On the other hand, decisions to file complaints were held exempt, without distinguishing between pending and completed litigation. *Id.* at 159-160. Thus this Court assumed that the work product protection survived the termination of the suits for which the documents were prepared.

Contrary to petitioner's contention, the court of appeals respected the role of the district court to decide whether to compel disclosure of specific documents. Rather than attempting itself to ascertain whether the documents at issue constituted attorney work product or whether petitioner could establish sufficient need to outweigh the United States' intra-governmental communications and work product claims, it remanded the case for the trial court to make those determinations under the correct legal standards.[8]

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DANIEL M. FRIEDMAN,
Acting Solicitor General.

DONALD I. BAKER,
Assistant Attorney General.

BARRY GROSSMAN,
ROBERT J. WIGGERS,
Attorneys.

MARCH 1977.

---

[8] Petitioner's suggestion (Pet. 11, 19) that the government has adopted inconsistent positions on this issue here and in *United States* v. *International Business Machines Corp.* 539 F. 2d 703 (C.A. 2), is another challenge to the government's good faith. In that case, IBM sought a writ of mandamus to overturn an interlocutory discovery order. The court of appeals agreed with the government that mandamus would not lie. The government disclosed to the Second Circuit its position in this case (Pet. App. F 27a and n. 20), stated that it adhered to that position, but argued that even if Chief Judge Edelsteins's legal theory was erroneous the error did not justify a writ of mandamus. The Second Circuit denied the petition from the bench (Pet. 11, n. 11). In contrast, the instant case involves an appeal by the government from a final judgment in which the government claimed that the dismissal of its complaint was based on erroneous legal standards. The Sixth Circuit was informed after the argument of our position in *United States* v. *International Business Machines Corp.* The difference in the cases lies simply in the difference between the standards of judicial review applicable to mandamus and to appeals.

DOJ-1977-03